From the Auth

Toleration Act Explained.

AN

ANSWER

TO A

LEGAL ARGUMENT

ON THE

TOLERATION ACT,

SHEWING THAT THE

COURT OF QUARTER SESSIONS

Have a Judicial Function

AS TO THE ADMINISTRATION OF OATHS TO PERSONS OFFERING THEMSELVES FOR QUALIFICATION AS PROTESTANT DISSENTING MINISTERS.

BY A BARRISTER OF THE TEMPLE.

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&c. &c.

THE subject of the Argument, which I have undertaken to answer, has long seemed to me one of great importance, and the first appearance of the advertisement announcing the publication excited a proportionate interest in my mind. I have since found that it is the production of a learned friend, whose talents and attainments, in common with all who know him, I highly respect. It is, however, in my humble judgment, calculated to disseminate very erroneous views of the question in dispute, and as my opinions are at least the result of deliberate and unbiassed conviction, I submit them to the public eye, not despairing that the author of the Argument may be induced to allow, that there exists some reason to doubt of the conclusions which have hitherto appeared to him satisfactory, if not sufficient to abandon them. At all events his honorable mind will wish the subject to be fairly and unreservedly discussed.

It must be admitted, that the general opinion has been in favor of his conclusions; not, however, in the extent which he has asserted*. Some exceptions have been known to the prevailing, and, in my view of it, erroneous construction of the Act, particularly in the Counties of Hants, Bucks, Caernarvon, Devon, Norfolk, and Suffolk. In the first of these Counties, an eminent practising Barrister is Chairman of the Sessions, and I believe the oaths are not (nor have been during his presidency in the Court) indiscriminately administered to all applicants, but that the party wishing to take them is previously questioned as to the object he has in view. If the answer is, That he wishes to take them *as a Dissenter only*, he is permitted upon his mere assertion to take them, and the taking is recorded, but he is always instructed that his certificate will only protect him against the penalties of non-conformity. If on the other hand, he claims any particular character among the dissenters, such as the Act specifies, he is required, unless the notoriety of the fact makes it unnecessary, to satisfy the Court by competent evidence, that he is invested with such character, and then, and not till then, is admitted to take the Oaths, and perform the other conditions required of a party *so* applying. If he comes without any claim to orders, and without a congregation, to qualify as a *Minister*, he is not allowed to do so, though admitted to qualify, if that is required, as *a Dissenter only*.

In the County of Bucks, about five years ago, two

* Page 30, 31, and 74.

persons applied at the same time to the Court to take the Oaths as Teachers, one being appointed to a congregation, the other not. The former was admitted to qualify, and the latter rejected for want of a congregation. He complained very much of the decision; but though the Chairman informed him, that the Court wished the question to be tried in Westminster Hall, and would afford him every facility if he chose to appeal to the King's Bench, this course was not adopted, and the judgment of the Court below remained in force. In Caernarvon, a little before the Denbighshire Case, a similar application to that rejected in Bucks was made, and met with a similar fate, the party in this Case calling himself a *Methodist* Teacher, a description which the Court considered as not within the Toleration Act, nor in any way advancing his claim to qualify as a Teacher.

The instances above stated of a practice contrary to what has been assumed as universal till the Denbighshire Case occurred, can be readily authenticated. The others stand on more general reputation; but have already been published*, and, I believe, without contradiction. I also know that this interpretation of the law, though certainly far less prevalent than the more lax and comprehensive interpretation, has accorded with the opinions of Lawyers eminent for their learning and sound judgment; and I am as strongly persuaded, as the Author of the Argument is with regard to his conclusions, that "it

* See British Review, No. 4, Page. 434.

requires only a calm consideration of the Statute," for the unbiassed mind to adopt those which I have formed, and shall attempt to support.

The positions he has maintained are set forth in Page 35 of the Argument in these words,—" That the Magistrates in Sessions have no power, either to refuse the oaths, or to enquire into the qualification of him who claims to take them ; that such claim is a sufficient warrant for the Court to administer them, and the bare statement of the description in which the party wishes to take them sufficient evidence of his answering that description; and that, if that description is comprised in the eighth section of the Toleration Act, the Court of Quarter Sessions is by law compellable to administer the oaths and the declaration, and to permit the subscription to the thirty-six articles, of which the Clerk of the Peace is also compellable to enter a record, and to grant a certificate."

The truth of these positions is admitted as to the claim of taking the oaths under the second section of the Act, and as they regard the Clerk of the Peace. But I trust it is consistent with the high respect I have professed for the Author of the Argument, and a becoming diffidence in my own conclusions, to say that in all other respects they appear to me to be contrary to the letter and spirit of the Statute, as well as to the genuine principles of religious liberty, which, like civil liberty, is *felo de se*, unless restrained within due bounds. I shall without further preface, state my reasons for adopting

an interpretation of the law fundamentally different, confining myself, as the Author of the Argument has done, to the several clauses of the Statute. I shall also notice some of his more detailed reasonings, from which I am compelled to differ.

To avoid, however, unnecessary subjects for dispute, I must premise, that if in the first of the above positions the term "*qualification*," as applied to the party claiming to take the oaths, is meant to involve "his fitness, or unfitness to act as a Dissenting Minister *," I shall not contend that the Magistrates are authorized *in that sense*, to inquire into his qualification. I think no such power was ever given by the Act; and, from its sound and comprehensive wisdom in other respects, I conclude it never was intended to be given. Indeed with the highest esteem for the noble Lord who has lately stood forward on this subject, in this single respect I thought, with much deference, that the provisions of the bill he introduced were not strictly according to the principles of toleration, or even to those which have hitherto governed the civil power with regard to the established religion. The fitness, or unfitness of a Minister, is a matter exclusively of religious regulation, to be decided by the rules of discipline in each Society, and, according to those of the Church of England, left entirely to the Diocesan, whom no earthly power can in this respect control.

I should have supposed, that the division of his

* Page 43.

subject pursued by the Author, which I am inclined to adopt, was likely to lead him to the important differences which appear to me to exist in the claims which he places on an equal footing of right. The claims to hold and privately maintain religious opinions differing from the doctrines of the National Church, or publicly to disseminate such opinions, to join in any communion already existing of that kind, or to form such a communion, to be excused for mere non-conformity to the discipline of the Church, or for conformity to any particular different mode of worship, do not appear to me more distinct than are the conditions required by the letter of the Statute from the several parties within its several provisions. Without reference to the words "required" and "empowered," which occur in the second and eighth sections, to which the Author has alluded, I would ask is not the description of those who claim to take the oaths under the former section such as may very safely, and, *from its nature*, more properly, be left to the bare assertion of the party, than to more solemn attestation, or the evidence of other persons? The object of the Statute is to give ease to scrupulous consciences, and to exempt Dissenters from penalties, and the sixteenth clause provides that the restraining Acts shall be still in force "against all persons except those *who attend some congregation or assembly, allowed or permitted by the Act.*" The taking of the oaths, therefore, *as a Dissenter only*, can not be open to abuse. If not for the purpose which the legislature has in its

wisdom approved, it will be nugatory, and can not serve a mischievous purpose. It is also, as I shall presently have occasion to remark on what the Author of the Argument has advanced respecting the qualification for offices under the Crown, matter of *compulsion*, or at least *may* be such under the twelfth section of the Act, that the oaths required by the second section shall be taken. But the taking of the oaths, and performance of the conditions required, on the part of those who claim to qualify *in a particular character*, is attended with very different consequences, especially, if from the union of two of the specified characters in one person, the claim to *exemptions* is afterwards set up under the eleventh section. If the particular character with which the party professes to be invested can be substantiated, he may securely, after qualification, teach his own religious opinions to any number of persons, with all the aid of corresponding rites and discipline. When any number above five, beyond those of his own household, have selected him for their religious teacher, he may be entitled to every privilege and exemption which the Statute has granted to those who unite two of the characters specified in the eighth section, and, if he pursues no other employment than that of a Schoolmaster besides his office of Teacher, to every privilege and exemption which any part of the law holds forth to Ministers of religion not connected with the Establishment. Can it be conceived, if the extension of religious liberty were now, for

the first time, about to pass into a law, that such very different privileges would be made attainable by the same means? And can the general persuasion, which has been the subject of almost as general *regret*, except among the Dissenting Body themselves, that such were the provisions of the Statute in question, be referred to any thing but this, That it was misconstrued in times when the evil of dissent was comparatively partial, or when that of previous legal restraint in religion had hurried the administrators of the law, by a natural and easy transition, to an extreme on the side of liberty?

I should have readily conceded to the Author of the Argument, if no such case as that of the King against the Justices of Derbyshire had ever occurred, that the Court of Quarter Sessions have no discretion as to a claim for registering *the place* of meeting for the purpose of religious worship. No *description* is given of the places which may be registered, and consequently *all* are entitled to registry *. This also is a thing which, as in the case of the oaths prescribed by the second clause, and the qualification for offices under the Crown, the law *commands to be done*, and therefore must at the same time render in *all* cases practicable. But the inference from hence, *à priori*, as to the *persons* who are to officiate in these meetings is the very contrary of that which the Author has drawn. The law not having required *the places* to be of a definite description, will on this very account

* 1 Ld. Raym. 126.

give some distinct character to the persons officiating, such as it may be not difficult to ascertain by the ordinary means of evidence. And what are its actual provisions in this respect? The answer is very obvious, that the persons must claim either as being, "in holy orders, or pretended holy orders, or pretending to holy orders, or as the preachers, or teachers, of a congregation of dissenting Protestants." This is the law. By whom is it to be administered? "By the Justices of the Peace, at the General Sessions of the Peace, to be held at the county or place where such person shall live." (Sec. ii.)—What then is this formidable *discretion* that is claimed, but a mere right to administer the law discreetly, and to decide whether a party claiming a privilege is entitled to it? Or what connection has this discretion with "the will * and pleasure of the Quarter Sessions?" If, indeed, the Justices step out of the Act, and enquire into "the fitness or unfitness of the party to act as a Dissenting Minister," or investigate his moral and intellectual qualifications, they may run some risk of making decisions of this arbitrary kind. But, at present, nothing of this sort has been attempted under the Toleration Act; the utmost tyranny they can exercise is limited by a Statute which, at the time it passed †, tranquillized the fears of very numerous sects differing in their religious doctrines and ceremonies, and they are liable to a mandamus, if they refuse to give instru-

* Page 75. † Burnett's History, vol. 2. p. 217.

mentality to the provisions of the law so left to their execution.

As to the interpretation of this part of the Act, I accord much more nearly with the Author of the Argument than with Mr. Smith, whom he has quoted. There have certainly been a variety of opinions as to what is the true meaning, but to one point of agreement all, I think, may be reduced, viz: that it was intended to specify certain persons of limited and definite descriptions. In the division of them, according to the negative particles, into *two* classes, the three first subdivisions relate to a distinct religious character, capable of being proved, and carrying with it some test of the claim of the party to be allowed to act as a minister of religion, and the two last imply appointments derived from others, who must at least amount, in point of number, to such a body as the law considers a *congregation*. The first subdivision may be taken, I think, to include persons who have been originally ordained, either according to the ritual of the Church of England, or to some other which that Church looks upon as spiritually valid, (e. g.) that of the Roman Catholic Church. The second includes such persons as, according to the discipline of their respective societies, assume to be ordained in a regular, and, in the opinion of the parties conferring as well as of themselves, a valid manner, though not assented to as such by our Church—such as that of the Presbyterians. The third includes all persons who have appointments

which they themselves consider equivalent to holy orders, though the parties conferring such appointments may perhaps be only managers of the temporal concerns of their own sect, and may not contend for the power of ordination, (*e. g.*) the Methodists and Quakers. Now in all these cases, as well as those described by the two latter subdivisions, the character which the party claims is capable of easy proof; and unless the most important and sacred functions which can be exercised by man are to be legalised in the hands of those to whom neither sound policy, nor any existing law, has ever delegated them, and whose exercise of any religious office might incalculably injure the cause of Religion itself, unless exemptions, hitherto intended for those who are fairly entitled to them, are to be indiscriminately extended to all who would screen themselves from public offices and burdens; and, in short, unless all the fences of religion, of law, and of common sense may be broken down under the sanction of the law itself, the administrators of this important branch of the Statutes will remember that they have a *judicial* function, in the exercise of which they are guided by the words of the Statute, and not permit themselves to be reduced to the rank of mere registering clerks.

I should be very sorry if the true interpretation of this most important Statute rested on any arguments of mine. Fortunately for the cause of the National Church, of religion, and of sound law, and, I should add, for the more respectable part of the

Dissenting Body, two appeals have been made against some late decisions upon it to the Court of King's Bench, and thus a judicial interpretation has been obtained. In the former* of these one David Lewis (who had been rejected by the Court of Sessions in Denbighshire, on his application to take the oaths as a Preacher, for want of a certificate of his having a particular congregation) moved for a mandamus to compel the Magistrates to administer the oaths. This was by the unanimous decision of the Judges refused, though the Lord Chief Justice thought the Court below might have been wrong in requiring a *certificate*, which they had certainly no authority under the Act to require. His Lordship, however, and the other three Judges, held that the party applying to qualify must bring himself within "some qualifying description in the Act," and that, not having done so at the Sessions or in the superior Court, he was entitled to no relief. In the second case, which was decided in the last Term, and is not yet published, the Magistrates of the Gloucestershire Sessions appeared to have been misled in their conclusions from the Denbighshire case, and to have refused two persons, who applied to take the oaths under another of the qualifying descriptions, viz. that of pretending to holy orders, on the same ground as might have been insisted on if they had applied as Preachers or Teachers. In this case, the Court of King's Bench, *not at all disturbing the former deci-*

* The King v. the Justices of Denbighshire, 14 Ea. 285.

sion, thought the applicants entitled to a mandamus, because the Court below had not denied the description they had assumed, but required the conjunctive one of Teacher of a congregation. Lord Ellenborough added, that if the Magistrates should return the applicants not to be persons pretending *to have* holy orders, the question, as to the interpretation of this part of the act, might be raised on a motion to quash the return. Or, if they should go farther, and say that the applicants had no holy orders whatever, an action at law might be brought for a false return. But his Lordship had previously in the course of the argument, alluded to a judicial construction of the words " pretending to holy orders," in Cator's case (Skin. 80), where they appear to be held synonymous with " pretending *to have* holy orders," and afterwards in his judgment, laid great stress upon the words of Lord Mansfield, in the King against the Justices of Derbyshire (4 Burr. 1991), where the mandamus to register and certify *the place* of meeting, was granted; but the Chief Justice expressly adds, " The registry and certificate do not prove that the applicants are within the act. They will still be obliged to show that they are *within the requisite qualifications*, if called upon; notwithstanding the register and certificate. And if, in fact, they are not within the qualifications, the Justices may return " that they are not," if they think proper to do so." Lord Ellenborough also quoted a judgment of Lord Holt, in the case *

* 6 Mod. 108, Peat's Case.

of an application to the Court of King's Bench to be admitted to qualify, " The party ought to suggest whatever is necessary *to entitle him to be admitted,* and if that be not done, or if it be done and the fact be false, that will be good matter to return." He also cited the 52d Stat. from Scobell's Acts, page 80, which says, " that none shall preach but those who have been ordained, except such as, for trial of their gifts, may be allowed by such as shall be appointed by both Houses of Parliament, and who have skill in the original tongues." This, added his Lordship, is the estimate of the qualifications necessary in a candidate for holy orders, at a time when literature is supposed to have been in disesteem, and enthusiasm at the highest pitch, and clearly shows that even then no general and indefinite allowance was given to preach in respect of a self-designation to that office.

I confess myself a little surprised, that the Author of the Argument could have quoted the judgment in the Derbyshire case, without making the same inference from it, which, it appears, the present Lord Chief Justice has done; still more, that this case should have been quoted as " a virtual decision," that in all applications to qualify under the Act, the the Magistrates are merely Ministerial. But I hasten to the examination of some of his more detailed reasonings in support of this doctrine, which I shall notice, as nearly as I can, in the order in which they occur.

It has been already said, (supra page 4.) that the

Author appears to have over-stated the extent to which his opinion on the main point in dispute may be considered the received opinion, and the same observation applies to his statement with regard to the oblivion into which the penal laws against nonconformists had till lately fallen*. Could the Dissenting body, or any member of it, be ignorant of their existence? Could Magistrates or Lawyers, or any Englishman well-informed in the Constitution of his Country? And was not every application to qualify a recognition of those laws? The Trial by Jury, complained of as "somewhat unusual," is expressly required by the sixth section of the Conventicle Act; and surely that provision must be considered as savouring much more of British liberty, than of arbitrary and undue power in the Justices at Sessions, of which the Author expresses so much jealousy.

The arguments which are drawn from the militia laws † have appeared to me very far from conclusive, or even applicable. Those laws are quoted indeed as being in *pari materiâ*, and on this account inferences from their provisions are deemed applicable to the present dispute: but the object of the Toleration Acts is to give freedom of religious opinions and worship to Dissenters from the established Church; while the Militia Laws, except in their clauses of exemption, are totally unconnected with that object. Are the legislature then liable to a charge of incon-

* Page 10. † Page 25, and seqq.

sistency, if they have narrowed any description contained in the Toleration Acts, when extending to the persons of Dissenters exemptions from particular duties, especially at a time when a call was made on the whole male population of the Country to a degree wholly unexampled? And let it be remembered, when we are considering how far the Militia Laws have in fact narrowed the description, that the Toleration Acts had placed exemptions from duties within the reach of those only who claimed both orders, or pretended orders; and the character of "Minister, Preacher, or Teacher, of *a* congregation."

As to the term "*licensed* Teachers," &c. which the Author himself admits in a subsequent page (67) to be "not in strictness incorrect," how does this make the exemption more narrow than the 19th of Geo. III. had already done? By that Act the Minister exempted from liability to militia ballot, must be a person "in holy orders, or pretended holy orders, or pretending to holy orders, *and* a Teacher or Preacher of a congregation of Dissenting Protestants, and qualified according to the Act. Of this qualification what is vulgarly called "*the licence*," is evidence. It is a copy of a record, made by the Officer of the Court, and by him authenticated as the Act requires, and varies, or ought to vary, according to the character in which the Oaths have been taken, for different conditions are imposed (whether we advert to the eighth section of the Toleration Act, or to the 19th of Geo. III.) upon those who qualify as persons in holy orders, &c. or as Teachers or Preachers, from

those required of persons qualifying as *Dissenters only*, under the second clause of the Toleration Act. The Record and the Certificate would be nugatory, if they are not evidence*, as has been very decisively asserted, of the qualification; and I know no reason for considering them in a different light from other Records and Certificates, which the Law has required a special officer to make, and *therefore* receives without further evidence. It may be necessary, indeed, where exemptions are claimed, to require "*other evidence*" of the fact, that the claimant is *still* connected with the congregation of which he is recorded to have been once the acknowledged "Minister, Preacher, or Teacher," but the certificate is alone, I conceive, in the first instance, evidence that the party has qualified, and in the case of prosecutions for mere non-conformity, is conclusive evidence. The same incorrectness as to the strict construction of the words in common use might be alledged, when "*qualification*" is applied with reference to the Corporation and Test Acts. The *real* qualification, of which the taking of the Sacrament is merely a solemn pledge, is that of attachment to the National Church. An act of religion is made the criterion of the religious principles of the party, and by the former of these laws the party must have communicated *before* he is invested with the office. The *fitness* of the man is measured by his *antecedent re-*

* Vide Page 49 of the Argument.

ligious habit *." And yet in common language, the act of taking the Sacrament is called the qualification, just as in the other case, the Certificate is called the "*Licence*." As to the word "*separate*," I entirely agree with the construction of its meaning afterwards given by the Author of the Argument, (Page 61,) viz. that "a separate congregation is a *congregation of separatists*." How then does the term separate vary the enactment, or how does the requisition that the licence shall be obtained *within the county*, repeal the Act of Queen Anne? That Act enabled a Dissenting Minister, who had qualified in one county to officiate in another, and *still enables him to do so;* a privilege, by the bye, which the Bishop's Licence† does not give to the Clergymen of the established Church beyond the particular Diocese. But how is this limitation to the *county* of any importance with regard to exemptions from the militia, as to which an exemption allowed in *one* County is an exemption in *all*, no person being liable to serve in more than one?

It is said (Page 36) with some confidence, that the sole object of the eighth section of the Toleration Act, is to remove heavy pains and penalties. But is this a strictly accurate assertion? The pains

* Vide Opinions and Judgments by Lord Chief Justice Wilmot, Page 142, Evans v. Harrison; and Bishop Sherlock's Arguments against the Repeal of the Corporation and Test Acts, Page 59.

† Rex v. Wroughton, Esq. 3 Bur. 1684.

and penalties are not merely for professing and conforming to a religion differing from the national, but for exercising spiritual offices, and the *privilege of exercising those offices in future*, unmolested by pains or penalties, is granted to certain persons of a definite character and description, who shall perform the conditions required. Are not then the Magistrates to be satisfied that parties offering themselves to perform such conditions are within the description specified? The words at the beginning of the clause should have otherwise been as *loose* and *general* as possible, or at most have required the applicant to aver himself to be within the description specified. *No such* provision, however, but, on the contrary, those of a most opposite kind, will be found. And here I cannot help noticing what appears to me a glaring inconsistency in a work, the sentiments of which the Author of the Argument nearly adopts, by a high recommendation of them, (Page 75). The object of that work is to prove the Justices in Sessions "purely ministerial," in the administration of the oaths of qualification, and yet, (Page 29) it is said, "If the Magistrates permit persons who are *not comprehended within the* 19*th Geo. III*, to qualify under that Act, it may admit of a doubt, whether those persons have not a claim to exemption from the duties in question. *Some* persons then ought *not to be permitted*, because *not comprehended* within the Act? But must not the Magistrates decide whether a particular person ought

to be permitted? And is the duty to permit or refuse *ministerial* or *judicial*? But can the doctrine which the Author of the Argument would uphold *, be supported by any analogy from similar laws, more especially from those afterwards instanced † as regulating the qualification for offices? It is truly enough asserted that the appointment to the office for which the Oaths are taken, can not be enquired into by the Court, any more than the officiating Clergyman can demand evidence of it when the Sacrament is taken, but he seems to have overlooked the third section of the Test Act, which expressly requires a certificate from the party offering himself to take the Oaths in Court, that he has within the time required taken the Sacrament, with two other witnesses of the fact, and prohibits the completion of the qualification, till that of which the legislature wished a particular test to be given, is satisfactorily proved to the officer who administers the Oath. That test is wholly unconnected with "*the character in which the Sacrament is taken* ‡;" but the *moral* character of the party wishing to qualify may exclude him according to the rubrics of the Church. "The man who comes *with a place* to receive the Sacrament, is in the same case as he who comes without one, and is liable to be refused for the same reasons §." Is this then an example, "that the claim of the party"

* Pages 35, 37, and 41

† Page 38 and 39.

‡ Page 39.

§ Sherlock, Page 65.

wishing to take oaths of qualification "is a sufficient warrant for the Court to administer them?" But in this case as before observed, the law *commands* the oaths to be taken by all persons who have accepted office, and annexes *no privilege* to the taking of them. The omission of them is the crime, and the loss of office the consequent penalty. If the oaths could be refused to *such* persons, the law itself would be the author of their disobedience. In the other case, particular persons are shielded in their violation of a previous general law on performing certain prescribed conditions, but the violation of that previous law, not of the law requiring the Oath, constitutes *their* criminality.

Another position brought forward by the Author (Page 29) with reference to the second section of the Toleration Act, "that the Court of Quarter Sessions are required to administer the oaths and declaration *not to Dissenters as such*, but to *all* persons who shall tender themselves for the purpose of taking and subscribing them," seems to me not less groundless and extravagant, than his doctrine respecting the eighth section, where we are told that "the description in which the party wishes to take the oaths," may rest upon his "bare statement." Who are the objects of the provisions of the Act? "Their Majesties' Protestant Subjects dissenting from the Church of England." Who are the persons to be relieved from penalties under the second section? "Persons dissenting from the Church of

England." And will the Author retain such an opinion for an instant, as that the Court of King's Bench would compel the Court of Quarter Sessions to administer the Oaths to a man who refused to declare himself a Dissenter from the National Church ? *

It must be admitted, that the next position, if supported by the fact, ought to have great weight. If " one interpretation of a law has universally and uninterruptedly prevailed during a long course of years," such interpretation will have a very strong presumption in its favor that it is " the true one." From the paucity of judicial decisions upon it, I confess myself unable to draw the inference which the Author has done. That appears to me rather to establish *abstractedly* that a particular law is either not much in use, or very clear and unambiguous in its provisions. The former character cannot attach to the Toleration Act, but to the latter it has, in my opinion, a strong claim, as well as to other distinctions which call forth our admiration. But what has been the interpretation of this law in the few judicial decisions which have been made upon it ? The cases quoted by my learned friend, except that of the King against the Justices of Derbyshire (which is strongly *against* the doctrine he upholds), while they

* It was expressly decided by Lord Holt (in 6 Mod. Case 278, Britton v. Standish) that " If a man be a professed Churchman, and his conscience will permit him sometimes to go to Meeting instead of coming to Church, the Act of Toleration shall not excuse him, for it was not made for such sort of people."

sanction in strong terms *the general principle* of toleration in religion, do not touch on the point now in dispute. On the other hand, the case of Peat (supra p. 15.) and those of the King against the Justices of Derbyshire, Denbighshire, and Gloucestershire, all, directly or indirectly, establish the power of the Court of Quarter Sessions to refuse the oaths to persons wishing to qualify under the eighth section of the Act, if they do not come "within a qualifying description *," and no decision of the superior Courts is brought forward, nor is any, I believe, to be found, which favors the contrary doctrine.

I should not have thought the distinction of the words "empowered" and "required" in itself worthy of notice, because it is clear, from the latest decision, that if the party applying to qualify can bring himself by satisfactory evidence within any of the descriptions specified in the Act, the Court of King's Bench will *compel* the Court of Quarter Sessions to administer the Oaths. But in this part of his subject the Author of the Argument draws an inference (p. 43) from a comparison of the Act of William and Mary, and that of the 19th Geo. III., with which I cannot accord, and the fallacy of which appears to me to operate too widely on the main question to be entirely passed over. Assuming that the word "require" in the latter Act renders the Justices wholly ministerial, he supposes the more scrupulous persons to be placed by it on a footing of greater advantage than those

* See 14 East's Reports, 285.

who may have been ready to subscribe *all* the Articles, and take *all* the Oaths, required by the 8th section of the Toleration Act, if that should be construed to include a power of refusal by the Magistrates, and hence infers, that no such power could have been intended. But a most important variance between the two cases is here entirely overlooked, viz. that "the more general form of profession" under the Act of Geo. III, is provided only for persons uniting *two* of the characters specified in the Act of William and Mary, by which a party offering to qualify under it is only required, as the decision above referred to also clearly shows, to possess *one* of the specified characters. This very materially alters the scale of advantage, and shows too with what precision the law is framed, and the importance of those fences by which its *beneficial* operation is secured, and the perversion of a principle, in itself the offspring of the purest wisdom and virtue, prevented. It is *because* the Magistrate has no "power to pronounce upon examination, as to the fitness or unfitness of the party to act as a Dissenting Minister" * (in which position I cordially agree with the Author), and because a reference to many other criterions of his fitness or unfitness *to be tolerated* in the public exercise of that office would either militate with the genuine principles of toleration, or with those which regulate the civil power even with regard to the established religion, that a most important duty attaches to Magis-

* Page 43.

trates of guiding their decisions by those wholesome and practicable criterions which the law has adopted, and pointed out as boundary lines never to be passed. Had the law committed " the fitness or unfitness of the party" to the judgment of the Magistrates, then indeed might a reasonable dread have been entertained that their decisions would be arbitrary and uncertain. The very point to be decided would strike different Magistrates in very different lights, because it would be wholly a matter of *opinion.* But whether a man is invested with holy orders, or pretended holy orders, or is a Teacher or Preacher of a Congregation, is wholly a matter of fact, and though whether he can reasonably *pretend* to holy orders (a term certainly open to a variety of constructions) is also partly a question of law, the judgment of the Court of King's Bench might be had in every disputed or difficult case, and probably indeed one decided case might set the question of law at rest. While therefore, according to the provisions of the Act, the State has set up a barrier for its own security against the dissemination of principles subversive of good order, of morality, or of any fundamental tenet of Christianity, it has done this in a manner to which no objection can be reasonably made. The party is merely required to be accredited by his own religious society; the spiritual validity of his orders is not inquired into, nor whether he has any orders whatever, if he has the character of Teacher or Preacher of a Congregation; this being deemed (when coupled with the Oaths he must take and the

Declaration to be made) a testimonial of character and principles sufficient for the security of the Public.

The next subject of my observations is the analogy to the supposed cases of Practisers in Medicine, which the Author has set forth, and I might probably surprise some of my readers by a minute description of the ordeal to which they are *really* subject, before they can practise without being thereby liable to severe penalties. I have been informed, on the best authority, that not a year passes without the rejection of one or more candidates for fellowships or licences at the College of Physicians, that the admissions are frequently not unanimous, and that the applicants, whether Graduates from our Universities, or Practitioners in Medicine, undergo a very strict examination as to their proficiency in the several branches of medical science. But the Author may answer, that *this* is not the ordeal he alludes to, and that its very existence makes any thing further of a similar kind unnecessary. Be it so. The case is still far from analogous to that of a Teacher of Religion. *The State* has no direct interest in the skill of the Physician *; but it is, according to the opinions of the firmest Advocates of religious liberty, deeply concerned in the question, *Who shall be tolerated as Teachers of religion?* In the debate on the Bill "for granting relief to Pastors, Ministers, and Lay Persons of the Episcopal Communion in Scotland," (32d Geo. III. c. 63.) Bishop Horsley (whose sentiments

* Hale's Pleas of the Crown, vol. i. p. 430.

on another occasion the Author quotes as friendly to religious liberty *), emphatically says—" In what sense the Bishops of this Church of Scotch Episcopalians may be Bishops, or what the validity of their ordinations may be, is not the question. The single question is, are the Episcopalians good subjects, and do they hold religious principles *fit to be tolerated?* that is to say, Are they good subjects, and do they agree with us in the fundamentals of Christianity? for these are the religious principles *fit to be tolerated.*" In the debate on the Corporation and Test Acts, 1790, Mr. Pitt after distinguishing " *real*" and " *reasonable*" toleration from that which would " impair the security and debilitate the vigor of government," adds—" the extent of the principles maintained upon the present occasion, appears, unless I have mistaken the drift of them, to proceed even as far as the admittance of *every* class of Dissenters. They seem to throw open a door for the entrance of *some* individuals, who might consider it as a point of conscience to shake our ecclesiastical establishment to its foundations." We learn from Collier's Ecclesiastical History †, that at a debate between the principals of the Episcopal and Presbyterian parties, in which Charles the Second presided, at the house of Lord Chancellor Hyde, Baxter, a leader of the Nonconformists, protested against toleration of Papists and Socinians. Mr. Locke, the avowed champion of toleration, expressly excludes Atheists and Papists; the for-

* Page 9. † Vol. ii. page 874.

mer as destitute of that principle of moral action upon which alone the safety of civil society can rest; and the latter, as not themselves owning the duty of tolerating others in matters of mere religion, and recognizing the jurisdiction of a foreign power. Lord Bolingbroke says*—"There are arguments, no doubt, even of the political kind, and of irresistible force, against Atheists who reject all religion, Latitudinarians who admit all alike, and Rigidists who suffer one alone. If the first prevail, there will be no religious conscience at all; if the second, there will be as many as there are religious sects in every society; if the third, persecution of religion will be made a maxim of government, to the bane of society, and to the shame of the Christian Profession." And in the following page—"The wisdom of our Constitution has therefore joined admirably well together the two most compatible things in the world, how incompatible soever they may have been represented, a Test and a Toleration; and by rejecting alike the principles of Latitudinarians and Rigidists, has gone far to the prevention of those evils that gave occasion to the objection of Atheists."

The law of England has confirmed these views of the policy which is here recommended. The Toleration Act makes certain exceptions; and the 10th Anne, ch. 7. for protecting the Scotch Episcopalians in the exercise of their religious worship does the same. And even those who are admitted to qualify are subjected to a solemn avowal

* Philos. Works, 4th vol. p. 630, essay 4, edit. 1754.

of their religious faith, which is required in fundamental doctrines to accord with the Church; their names, and those of their places of meeting are to be registered, and the latter are required to be open to the public. But the Author of the Argument has overlooked the main distinction between the imaginary case he has put, and that of the teachers of religion. With regard to the latter the supposed inquiries, by the answers to which the party applying must either defeat his application, or criminate himself, are also inapplicable. The true inquiry is, Has he any congregation? Or can he make out any claim to holy orders? And I must take the liberty of observing here, that they who claim protection for mere *aspirants* to the Dissenting Ministry should consider the Community as well as themselves, for the law ought to overlook neither the one nor the other. They do not like to appoint a Teacher to a permanent situation among themselves, unless he is approved on trial; but, if he is licensed, he is licensed every where, as the law now stands, and might thus be accredited with the public, and especially with Dissenters in distant parts of the kingdom, though disapproved by those who know his real character. If therefore, through the peculiar internal discipline of any sect, the present provisions of the law fail of extending toleration to its Ministers, at most let a new provision meet the specific evil*, and do not, to get rid of this, by a vague

* An exception is made in the Presbyterian prohibitory ordinance 1645, of "preaching for trial of gifts."

construction of the Statute, break down those barriers which our good and wise ancestors thought necessary for the general welfare of society, and the cause of pure religion. To these great objects, as I conceive, their policy was directed in framing the Toleration Act, marked as it is most distinctively with admirable wisdom. But the most comprehensive law, may by change of times require, on the same principle, further provisions, and it is more than surmised that at this time a sect, whose loyalty to the state, and agreement in fundamental articles with the Church, have never been doubted, is about to appeal on this ground to the Legislature. May those, whose province it will be to consider the grievances complained of, and the fittest remedy for them, make the well-poised enactments of the existing law the subject of their most serious reflection! And while the parties aggrieved are tranquillized by the new Bill; may those who think there are reasonable and necessary bounds even to the justly popular principle of religious liberty not be roused into an apprehension that its abuses are likely to be encouraged and augmented by the proposed alteration!

It is contended in a Note, Page 54 of the Argument, that according to the late construction of the Act of Toleration, the Roman Catholic clergyman will be put on a footing of greater advantage than the Dissenting Teacher. It is true, that the former has nothing to do, under the 31st of Geo. III. c. 32, but to make and subscribe the declaration and oath reqired by the Act in the King's Courts at Westmin-

ter, or at the Quarter Sessions, and to cause the same with *his description as Priest or Minister of higher rank*, to be recorded and certified (in which Act the Officer of the Court is purely ministerial), and that he may afterwards securely officiate to his congregation. But I again answer, that a very main distinction between the two cases, supposed to be quite analogous, is overlooked. The Law knows that Roman Catholic Ministers are all regularly ordained; the National Church recognizes the spiritual validity of the ordination, and will admit a converted Priest to an English benefice, or to cure of souls, without re-ordination. But in the case of a Dissenting Teacher, nothing is necessary but to prevail on any number of persons exceeding five, beyond those of a man's own household, to appoint him their teacher, and he, and the place of his meeting for religious worship, may be instantly legalized, though he may have no other pretensions whatever to a spiritual character, and may be, as many such persons are, regularly occupied in a worldly calling. The one is accredited by his office only, the admission to which, is, at the least as difficult as that of a Deacon and Priest to our own Church. The other, if he has nothing to show at all *similar* (for it is manifest that no niceties as to the *sufficiency* of different ordinations are recognized by the Statute), ought surely to prove himself invested with an appointment by five, or more persons, who meet at some given place for the purposes of religious worship. Is this a condition of religious

thraldom? Is ours a Constitution with which Dissenters can be reasonably discontented?

The only remaining topic which will be noticed before this Answer is drawn to a close is one already adverted to, but on which the Author speaks much more in detail towards the end of his Argument, I mean the inefficacy of the certificate to substantiate a claim of exemption from the Militia, or other public burden. On this point I will only add to what has been before "stated, that the Militia Act "gives the exemption to *licensed* Teachers of any "separate congregation," and that the *licence* is, we all know, nothing more or less than *the certificate granted at the Quarter Sessions.* Hence it is at least *part* of the evidence to be produced to the Deputy Lieutenants by a party claiming the exemption, and indeed *this* is admitted by the Author (Page 66) for he says, it "must be produced;" and even if this were doubtful under the Toleration Act, I think it could not be under the 19th Geo. III. where the words immediately following the requisition of a registry and certificate of qualification are, "and every such person, qualifying himself as aforesaid, shall be exempted from serving in the Militia." But even under the Toleration Act, the registry and certificate of qualification under the eighth clause are required by a *special* enactment, as if totally unconnected with the requisition which applies to qualification under the second section, and *therefore* must be provided *for other purposes,* of which *in practice*

the exemption alluded to is one, and I am at a loss for grounds to dispute the validity of such practice as irregular and illegal.

It has been at all times contended, and it is to be feared more prevalently for some years past, that the civil power has *no concern whatever* * "with the religion of a nation, or any part of a nation, where that religion does not manifestly tend to disturb the peace of society †." But can such a doctrine be deemed constitutional? And in a country where the Supreme Magistrate is clothed with the mysterious sanctity of *Head of the Church*, where he presides in ecclesiastical as well as civil causes, and where the Ecclesiastical and Temporal Courts were originally united? Spiritual tyranny, indeed, as well as civil, is a dreadful evil, but there is an opposite one of spiritual, as well as of civil, anarchy and confusion. The care of a man's soul is of too much concern to every one to be taken, by compulsory means, out of his own

* See the first Page of the Pamphlet recommended by the Author of the Argument.

† To such a length is this doctrine carried by persons zealous in the cause of religious liberty, that a writer of great respectability among the Dissenters, holds forth the example of Gallio, the Roman Proconsul at Corinth, to all other Magistrates, and actually "prays that his spirit may be given them," merely on account of his refusal to hear an accusation against St. Paul *on the score of Religion*, though the sacred history proves him to have been equally indifferent to *the punishment, without any trial whatever*, of Sosthenes the Jewish ruler, in his own presence while he sat in judgment.—*Doddridge's Expositor, Vol.* 3, *P.* 274. 8*vo. Ed.*

hands, and the rights of *conscience* are natural rights, which no *human* tribunal can reach. But a public and open propagation of our peculiar opinions, however conscientiously adopted, is a very different right, and, like every other right of individuals affecting the community (which no *private* opinion can do) must be submitted to public rights, and subject to such restraints as those to whom the legislative power is entrusted have thought necessary for the maintenance of the public welfare. Were it otherwise, while we avoid the former evil we should soon rush headlong into the latter. To religious scruples, however, the wisest governments have extended much indulgence, and the later history of our own Country has exemplified the inestimable benefits to be derived from the adoption of genuine toleration. No reflecting man can doubt that to this principle we owe, under Providence, the great extension of truth and charity, and that, while partial evils have resulted from the perversion of the boon, it has abundantly compensated for these by an incalculable surplus of good. And here may I be allowed to say that, if we consider the difficult and complicated questions which might have impeded the easy and rapid completion of a law which has been justly called our Magna Charta in Religion, had its provisions not been characterized by great wisdom and prudence, we may be disposed to investigate with greater attention and respect the means employed by our ancestors to promote public tranquillity. We shall

there find judicious, well-defined, and guarded enactments in favor of the free exercise of religion, and not such as, in our haste to decide what the law *is* by our own less matured notions of what it *ought to be*, have been of late in many quarters promulgated as the true principles established at the Revolution, and embodied in our statute book. The argument for a licence to every pretext of conscience, however vague, novel, undefined, and unsubstantiated, would embrace Pagans, Mahometans, idolaters, and the most mischievous oppugners of the National Religion; for no one could deny that all those persons have consciences as well as Christians, so that to grant *unlimited* and *general* licences (e. g.) to Teachers and Preachers, before they are invested with any authority, or connected with any body of individuals, would be in effect to tolerate whatever human folly or perverseness might attempt. If I am answered, as I may be by many persons, to whose understandings I am disposed to defer with great respect, that the *subsequent* control of the law is open against all public dissemination of political, moral, or religious principles hostile to the interests of the community, and that this is sufficient, without any *previous* restraint, for the public security, I can only repeat, in confirmation of my own rooted opinion, that the warmest advocates of toleration have thought otherwise, that the British Legislature has at all times enacted otherwise, that the one is a tried and safe, the other an

untried and hazardous path, and that it is better to anticipate evil designs, than to punish evil actions.* If, indeed, it can be made appear that toleration is still incomplete, that Dissenters have not the free exercise of their religion, that their Teachers and places of meeting are not protected, or that their internal discipline is controled by the civil power; or if to any *particular* sect, "*fit to be tolerated,*" this protection is less perfectly conveyed than to the rest, there is reasonable ground of complaint. But I trust it will not be thought a very extravagant opinion that the general answer to these points of inquiry must be most favorable to the *present* situation of our dissenting countrymen. And when to these, which may be deemed only negative advantages, are added the many *privileges* which by the operation of the annual bill of indemnity (the renewal of which for ever may be said to depend *on themselves*) are

* "The Dissenters will not do me the injustice to imagine that I, illiberally, mean to cast an *odium* on their persuasion, when I assert, that probably they may indulge a wish to subvert the Established Church. Nor do I contend that they would deserve the violence of reprehension, if adhering to the *principles* they now profess, and acting *conscientiously*, in obedience to *their* dictates, they made it a point of duty, in the character of *honest men*, to aim at this subversion; for persons who regard the establishment as *sinful*, and bordering upon idolatry, would not act with a consistent rectitude of heart and mind, unless they recurred to all legal means for the extirpation of an *idolatry* thus odious to their ideas, and thus insufferably repugnant to their doctrines."—*Mr. Pitt.*

open to them, must they not allow that they, as well as the Members of the Establishment, have abundant reason to value the English Constitution? And whenever they may be advised by rash and injudicious men to seek for change, will not the feelings of veneration and gratitude, as well as the obvious dictates of true policy, lead them jealously to preserve in its own place, and unimpaired, every stone of the inimitable and consecrated fabric?

——————— *Si robora sacra ferirent,*
In sua credebant redituras membra secures.—LUCAN.

THE END.

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